SAS Electrical Services, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 26, AFL–CIO. Case 5–CA–24688

July 14, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 19, 1996, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Union filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, SAS Electrical Services, Inc., Herndon, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Within 14 days from the date of this Order offer full and immediate employment to those individuals on Local 26's out-of-work list who since January 1, 1993, were denied an opportunity to work for Respondent because of its failure to comply with the hiring hall provisions of Respondent's bargaining agreements with Local 26, in the manner prescribed in the remedy section of this decision."

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that certain allegations in the complaint, as amended at the hearing, are not barred under Sec. 10(b), we find it unnecessary to pass on her finding that the Respondent had waived its right to raise the 10(b) defense.

[2] No exceptions were filed to the judge's recommended Order requiring the Respondent to reimburse the General Counsel and the Union's litigation expenses.

We will modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

Angela S. Anderson, Esq., for the General Counsel.
Shirley A. Stewart, of Herndon, Virginia, and *Richard S. Brooks, Esq.*, of Arlington, Virginia, for the Respondent.
Brian A. Powers, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Washington, D.C., on July 24–26 and September 26, 1995, pursuant to a charge filed against Respondent SAS Electrical Services, Inc. by International Brotherhood of Electrical Workers, Local Union No. 26, AFL–CIO (the Union) on September 6, 1994; and a complaint issued on December 16, 1994, and amended on July 6 and July 25, 1995. The complaint in its final form alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by (a) since January 1, 1993, refusing to adhere to a collective-bargaining agreement and making unilateral changes in wages, hours, and working conditions; (b) refusing since about June 1, 1994, to furnish the Union with certain information; and (c) around October 1994, and possibly at other unknown times after March 1994, dealing directly with employees.

On July 24, 1995, the first day of the hearing, an appearance on Respondent's behalf was made by Attorney Richard S. Brooks; the General Counsel and the Charging Party were also respectively represented by counsel. The hearing resumed on July 25 and 26, 1995, on which date the hearing was adjourned, with the agreement of all parties to resume on August 24, 1995. At about 11 a.m. on August 23, 1995, my office received from Brooks a faxed motion for leave to withdraw as counsel, and for a continuance until early November 1995, in order to enable Respondent to retain new counsel. The motion averred that Shirley Ann Stewart, Respondent's owner and president, had made counsel aware on August 22, 1995, of her desire to retain counsel "from a [basic] disagreement in approach and concern as to whether counsel who was brought in at the eleventh and a half hour is really prepared to represent [Respondent] to the extent that Ms. Stewart desires." In the afternoon of August 23, counsel for the General Counsel and counsel for the Union filed oppositions to a continuance and contended, in the alternative, that the requested continuance was too long. By order dated August 23, I granted Brooks' motion for leave to withdraw as counsel. My order went on to state:

> While Respondent is entitled to a reasonable continuance in order to obtain new counsel and enable such counsel to prepare his case, the proposed date of early November 1995 appears to be excessively late. Accordingly, the resumption of the hearing is hereby continued from August 23 to a date to be determined in the future after consultation between all counsel and me. Respondent is hereby ordered to obtain any counsel that Respondent may chose [sic] to retain [within] 2 weeks after the date of this Order, and immediately upon obtaining such counsel, to advise opposing counsel and me in writing of such new counsel's name, address, telephone number, and fax number. If such information is not received within 15 days of the date of this Order, a resumption date will be fixed by me after consultation with counsel for the General Counsel, counsel for the Charging Party, and Respondent.

A footnote to this Order set forth representations by counsel for the General Counsel and counsel for the Charging Party that they were available on, among other dates, September 26, 27, and 28.

At about 12:30 p.m. on September 6, my office received a faxed letter from Respondent (through Stewart) asking "for an extension to obtain counsel for September 22, 1995." By fax received by my office about 8:30 a.m. on September 7, counsel for the General Counsel stated that "the matter should be rescheduled for resumption on available dates previously discussed and no further continuance or extensions should be granted." At 6:45 a.m. on September 8, Stewart left a message on my voice mail that she did not wish to participate in any conference calls until she obtained counsel. On September 8, 1995, I issued an order (received by Respondent on September 14, 1995), setting the resumed hearing for 8:30 a.m. on September 26, 1995 (a date when counsel for the General Counsel and counsel for the Charging Party had both stated they were available), at the Board's Resident Office in downtown Washington, D.C.

Counsel for the General Counsel, counsel for the Charging Party, and I were all present in the Resident Office hearing room at 8:30 a.m. on September 26, 1995. At the time the hearing was adjourned (on July 26, 1995), Stewart had been subpoenaed by counsel for the General Counsel as a witness and to produce documents which she had not yet produced, was being examined by counsel for the Charging Party, and had not been excused. Stewart operates her business out of her home in Herndon, Virginia, which is in the Washington, D.C. metropolitan area. Neither she nor any counsel for or other representative of Respondent came to the hearing room on September 26. At 10:30 a.m., 2 hours after the hearing had been scheduled to begin, I went on the record. The General Counsel thereupon introduced into evidence various documents described in the preceding paragraph.

At this point, at 10:40 a.m., a faxed letter from Stewart to me (with courtesy copies to counsel for the General Counsel and for the Charging Party), dated September 26, was delivered to me in the hearing room by Resident Office regional personnel. This letter stated, inter alia, that Brooks would again be representing Respondent, and would submit "his document for re-entry before, September 29, 1995."[1] Counsel for the General Counsel thereupon telephoned Brooks' office, reached only his answering machine, and thereafter telephoned Stewart, who said that he was on the road.

At this point, counsel for the General Counsel stated that if the hearing was closed and was not for any reason reopened, she was willing to waive any further testimony by or further documents from Stewart, and rest. Then, counsel for the Charging Party stated that he was willing to accept the record as it was with Stewart. He called one witness on his client's behalf, and then rested. I set October 31, 1995 (the latest date permitted by Board rules), as the due date for briefs, and then closed the hearing.

By letter to Brooks dated September 26, with courtesy copies to Stewart (inter alia), I stated, inter alia, that at the resumed hearing, counsel for the General Counsel and for the Charging Party each put on some additional evidence and then rested; that I then closed the hearing; and that simultaneous briefs were due on October 31, 1995.

By letter to me dated October 2, 1995, Brooks stated that he was again appearing on Respondent's behalf. His letter went on to say, in part:

> Unfortunately, my schedule currently is backed up and I will not be available until around the first week of November, 1995, and I will need then probably about a week to prepare again.
>
> If you have no objection I will communicate with counsel as to agreeable dates and will submit such to you for approval within the next few days. Unfortunately, my availability to conference during the day is extremely limited because of trials.

On October 4, 1995, counsel for the Charging Party filed an "opposition" to this letter.

By letter to Brooks dated October 12, 1995, I stated, in part, that I did not interpret his October 2 letter as constituting a motion to reopen the record, but that the October 4 "opposition" filed by counsel for the Charging Party indicated a different interpretation by him. My letter went on to say:

> If you wish the record to be reopened, you are directed to file a formal motion with me to that effect, together with a statement of what evidence you intend to produce and a showing of good cause for Respondent's failure to produce it earlier. Any request for an extension of time to file briefs should be directed to Chief Administrative Law Judge David S. Davidson.

The brief of counsel for the General Counsel was mailed on October 27, 1995, 4 days before the October 31 due date; the brief of counsel for the Charging Party was hand-delivered to my office at 4:45 p.m. on October 30. At about 5:15 p.m. on October 30, after conducting a hearing that day in another case, I saw for the first time a faxed copy (received by my office at 9:45 a.m. that day) of a document from Brooks captioned "Motion to Reopen Proceedings, or Alternatively for an Enlargement of Time in which to Brief." By Order dated October 31, 1995, I denied the motion to reopen the record, on the ground (1) that notwithstanding my October 12 letter, Brooks had failed to provide a statement of what evidence he intended to produce and, therefore, had failed to show that reopening the record would serve any useful purpose; and (2) that Brooks' unexplained delay in filing the motion had required opposing counsel to prepare and serve a brief on the assumption that the record was complete. As required by Rule 102.42 of the Board's Rules and Regulations and as pointed out in my October 12 letter to Brooks, the motion for an extension should have been filed with Chief Administrative Law Judge Davidson, to whom I referred that motion. On October 31, 1995, he extended the due date to November 7, 1995. Judge Davidson's letter to Brooks went on to state (emphasis in original): "*No further extensions will be granted. As this extension was requested after the General Counsel and Charging Party mailed their briefs, they will be given the opportunity to file reply briefs if requested.*"

[1] See ALJ Exhs. 1 and 3, discussed infra.

A letter from Brooks to me dated November 9, 1995, but misaddressed and not received by my office until November 22, 1995,[2] states in part:

> Enclosed are the executed affidavits of Mme. Shirley Stewart and Mr. Vernon Turner. They are identical to the affidavits that are appended to Respondent's brief; they simply had not been executed and returned to me in time to file initially.

By letter to Brooks dated November 27, 1995, I advised him that our office had no record of receiving any brief from him in this case. On that same date, November 27, my office received a faxed motion from counsel for the Charging Party to strike Respondent's brief, on the ground that he had not received a copy of Respondent's brief nor (on information and belief) had copies been received by counsel for the General Counsel or by me. On the ground that the record had been closed, counsel's motion further requested, in the event Respondent's brief was found to be properly filed, that the two affidavits be stricken, along with the portion of Respondent's brief relying on facts set forth in the affidavits. On the same date, I received from counsel for the General Counsel a faxed motion to strike the affidavits, on the ground that they "clearly contain rebuttal evidence appropriately admitted at hearing." Referring to Brooks' letter representation that copies of these affidavits were appended to Respondent's brief, counsel stated that she had not received a copy of Respondent's brief, and requested that if I had received a copy, it be stricken. Attached to both motions was a certificate of service on Brooks, setting forth his correct address. Also, union counsel attached to his motion a statement that the motion had been faxed to Brooks on November 27.

On November 28, 1995, I issued a written order requiring Respondent to show cause within 10 days why the motion to strike these affidavits should not be granted; failure to reply was to be deemed to constitute consent. I noted in that order that I had failed to receive a brief from Respondent. No brief from Respondent has ever been received by me nor (so far as I am aware) either opposing counsel; nor has Respondent's counsel averred, at any time except in his letter dated November 9, 1995, that he ever filed a brief. No reply to my order to show cause having been received by the due date, by order dated December 11, 1995, I struck these affidavits on the ground: (1) that they constitute inadmissible hearsay; (2) that the November 7 affidavit is incomplete, in that it refers to two documents which are allegedly attached thereto (Exhs. A and C) but were not so attached in the copy sent to me; and (3) that Respondent's attempted action in connection with these documents constituted, in effect, an effort to reopen the record after I denied Respondent's motion to reopen, which denial Respondent failed to appeal pursuant to Section 102.26 of the Board's Rules and Regulations. Because no brief from Respondent had been received by opposing counsel or by me, I denied, as moot, opposing counsel's motion to strike such a brief.

A faxed letter to me from Brooks dated January 16, 1996, stated, in part:

> While out of the area a "show cause" order was directed to the undersigned.
>
> Obviously, I and my client were unaware of the referenced order; thus, no response was made.
>
> If you will allow, and a final decision otherwise has not been made, I would like an opportunity to respond.
>
> Please advise if a response will be permitted and entertained.
>
> Unfortunately, when I returned to the area earlier this month, government was shut down. Then the snow and a holiday.[3]

A faxed letter from counsel for the Charging Party dated January 16, 1996, opposed Respondent's request to "belatedly" respond to the order to show cause. This letter averred, "The repeated inability of Respondent and its counsel to adhere to response dates, hearing dates and other deadlines is intolerable and, in the end, clashes with the orderly and expeditious handling of the case."

Shortly after I received Brooks' January 16 letter, copies of my November 28 show-cause order, and of my November 27 letter to Brooks advising him that I had not received a brief from him, were returned to me (via the Agency's mailroom) by the Postal Service in the correctly addressed envelopes which had been sent to Brooks by certified mail. These envelopes were postmarked November 28, and indicated that they had been unclaimed notwithstanding notices left to the addressee on November 29 and December 4. Although the envelopes indicated that they were being returned on December 14, 1995, they were not received by the Agency's mailroom until January 16, 1996. Under a covering letter dated January 17, 1996, I mailed to Brooks additional copies of both documents. On January 19, 1996, I mailed to Brooks a second copy of my December 11 order (granting the General Counsel's motion to strike affidavits, and denying (as moot) motions to strike brief), with a covering letter stating that Brooks' January 16 letter suggested that he had not received that order.

As to these matters, I heard nothing further from Respondent until receiving a document dated July 17, 1996. Brooks filed this document in response to an order to show cause (issued by me on July 10, 1996) why I should not receive into evidence, as Administrative Law Judge's Exhibit 3, a photocopy which is identical to Administrative Law Judge's Exhibit 1 (also a photocopy), except that (1) Administrative

[2] The letter bore the then address of the Resident Office—namely, 2120 L Street, N.W. The office of the Judges' Division is located about 7 blocks away—namely, at 1099 14th Street, N.W. My 14th Street address is on the letterhead of letters sent by me to Brooks on September 26 and October 12, 1995. A November 27, 1995 motion filed by counsel for the General Counsel, whose office address was the L Street address, avers, inter alia, that she too received the letter dated November 9, and the enclosed affidavits on November 22, and that this material bore a November 20 postmark. I have never received the envelope which contained the November 9-dated material which Brooks mailed to me. Because Brooks' letter to me bears the address of the resident office, this material may have been received by it and forwarded to me, with or without the envelope. Normally, our office logs letters to the judges and then forwards the envelopes, as well as the letters, to the addressees.

[3] For lack of funding, the agency was shut down between Tuesday, January 2 and Friday, January 5, 1996, inclusive. Because of heavy snow, the Agency's Washington, D.C. offices were also shut down on Monday, January 8; Tuesday, January 9; Wednesday, January 10, and Friday, January 12. Monday, January 15, was a holiday.

Law Judge's Exhibit 1 includes a photocopied facsimile transmittal sheet, while proposed Administrative Law Judge's Exhibit 3 does not; and (2) the first page of proposed Administrative Law Judge's Exhibit 3 includes a printed line (at the bottom of the page) which is on the original, photocopied letter but had not been photocopied when Administrative Law Judge's Exhibit 1 had been prepared. Respondent's counsel filed an objection to the admission of proposed Administrative Law Judge's Exhibit 3. In this objection, Brooks appears to state that he had never received, or had notice of, any motion to strike the affidavits tendered by him under the date of November 9, 1995. My December 11 order specifically describes such motions, and Brooks had never before drawn any such assertion to my attention. Brooks' objection states that because I learned on January 16, 1996, that he had never claimed my November 28 show-cause order notwithstanding a "second notice" to him from the Postal Service on December 4, and because he never replied thereto, I "knew, or should have realized" (on December 11, when I granted the motions to strike?) that he had never received the motions to strike filed on November 27 by the General Counsel and union counsel, respectively. On the basis of these assertions, and because the record herein has been closed, Brooks contends that carelessness in photocopying (my suggestion as to why the last line of the original letter does not appear on the photocopy received as ALJ Exh. 1) does not "rise to a recital of cause or basis for this motion [sic]," and to even suggest receipt of proposed Administrative Law Judge's Exhibit 3 on this basis "bespeaks of unequal treatment—an obvious different standard being applied which is unwarranted, if not unconscionable and illegal."

As to what amount to due-process claims in connection with my December 11 order, in which I refused to receive into evidence two affidavits (one of which was incomplete) which were alleged to have been attached to a brief which was due on November 7 but which Respondent's counsel never filed, I note that after receiving about late January 1996 a copy of that order, which specifically described the November 1995 motions filed by opposing counsel, Brooks never requested me to reconsider that order nor (so far as I am aware) complained to opposing counsel that he had never received their motions and asked for copies. Further, because signed receipts for certified mail are not routed to the judge on the case as a matter of office routine, I was unaware until receiving the material returned to me on January 16 that between November 29 and December 4, or at any other time, Brooks had experienced any problems in receiving certified mail; I was unaware until receiving Brooks' faxed letter on January 16 that he had been out of the area between a period which apparently began before November 29 and ended some time in January without (apparently) having made any arrangements for anyone to handle business mail which arrived in his absence; and I was unaware, before receiving Brooks' July 8 "objection," that on November 27, or at any other time, he had experienced any problem in receiving faxed material.

Proposed Administrative Law Judge's Exhibit 3 consists of a photocopy of a letter faxed to me from Stewart, Respondent's president, which is dated September 26, 1995, and the first page of which has been put by a word processor on Respondent's printed letterhead stationery. As previously noted, this exhibit is the same as Administrative Law Judge's Exhibit 1, except that the last printed line on page 1 does not appear on the photocopy which constitutes Administrative Law Judge's Exhibit 1.[4] The absence of this line, whose significance is discussed infra at footnote 22 and attached text, was the basis for my suggestion that the document should be received into evidence. Respondent questions neither the authenticity of the letter of which Administrative Law Judge's Exhibit 1 and proposed Administrative Law Judge's Exhibit 3 are photocopies, nor the propriety of my having received Administrative Law Judge's Exhibit 1 at the hearing, nor the fact that as to the first page of the letter, that exhibit is an incomplete photocopy and the proposed exhibit is a complete photocopy. Accordingly, receipt of proposed Administrative Law Judge's Exhibit 3 is in no respect inconsistent with my action (on December 11, 1996) in refusing to receive into evidence the two affidavits (one of them incomplete on its face) which Respondent offered into evidence more than a month after the record had been closed. For the foregoing reasons, proposed Administrative Law Judge's Exhibit is received into evidence.[5]

On the basis of the record as a whole, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and counsel for the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Virginia corporation with an office and place of business in Herndon, Virginia. At all material times, Respondent has been engaged in the business of electrical contracting in the construction industry for residences and commercial properties. At all material times, Respondent has been doing business in and engaged in electrical work in the District of Columbia. I find that Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act. *A.L.S.A.C.*, 277 NLRB 1532, 1533 (1986); *ARA Services*, 203 NLRB 407 (1973); and *Catholic University of America*, 201 NLRB 929 fn. 3 (1973).

II. THE UNION'S STATUS

At all material times, the Union has been a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background; November 1989 Execution of Letters of Assent and Benefit Fund Agreements*

The Union operates a hiring hall which will refer employees to only employers who have a contract with the Union. On or shortly before November 13, 1989, Stewart came to the office of John P. Widener Jr., who at that time was the Union's business manager, and said that she was going to go into business and wanted a signed agreement with the Union. On November 13, 1989, Stewart signed three documents

[4] In addition, proposed ALJ Exh. 3 does not include a facsimile transmittal sheet which is part of ALJ Exh. 1.

[5] I note, moreover, that the original letter is part of the formal file herein.

each captioned "Letter of Assent—A," and a document captioned "Benefit Fund Agreement," all of which were signed by Widener on December 18, 1989, and approved by the Union's parent International on January 29, 1990. Each "Letter of Assent" stated that Respondent authorized the Washington, D.C. Chapter of the National Electrical Contractors' Association (which Chapter is hereafter referred to as NECA) to act "as [Respondent's] collective bargaining representative for all matters contained in or pertaining to the current and any subsequent approved . . . labor agreement [Inside, Residential, and Communications/Telephone Interconnect, respectively] between (NECA) and (the Union)." "This authorization, in compliance with the current approved labor agreement, shall become effective on the 13th day of November 1989. It shall remain in effect until terminated by the undersigned employer giving written notice to [NECA] and to the [Union] at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement." The "Benefit Fund Agreement" called for payments into a pension trust fund, a health and welfare trust fund, a joint apprenticeship and training trust fund, and an individual account trust fund. That agreement provides that it "shall be in effect from the 13 day of November, 1989 to the 31 day of May, 1990, and shall continue in effect without further action from year to year, until either party gives written notice to the other of a decision to terminate the agreement according to provisions in the Letter of Assent."

The assent letters contain no notation of approval by NECA, which does not customarily approve letters of assent to the NECA agreements.[6] A letter to Stewart from NECA Executive Director Andrew A. Porter, dated February 6, 1990, and under a "Washington, D.C. Chapter National Electrical Contractors Association" business letterhead, which includes NECA's address at all times relevant here, states:

> [Y]our firm has become signatory to one or more labor agreements maintained between [NECA] and [the Union]. The letter(s) of assent binding your firm to the labor agreement(s) also designates this Association as your collective bargaining representative.
>
> I wish to welcome you as an employer in our bargaining group [and] to offer the Association's assistance in any matter relevant to your labor relations with [the Union].

Respondent never contacted NECA to dispute this letter.

Widener credibly testified that the Union follows the procedure of providing an employer, when he "signs on," a package which includes copies of the trust fund agreements and any bargaining agreement as to which that employer had signed a letter of assent. He further credibly testified that when Stewart left his office, she carried with her a "package of information," but that he did not personally go through and review each of the documents which were in her folder. On the first day of the hearing (July 24, 1995), I received into evidence without objection the trust fund agreement, and the "inside Wireman" collective-bargaining agreements effective between 1989 and May 1990, June 1990–May 1994, and June 1994–May 1997. Thereafter, when testifying on July 25, 1995, as to Respondent's compliance with a subpoena served on July 21, 1995, Stewart was asked whether Respondent had in its possession any agreements between Respondent and the Union for 1989 to the present, to which she replied, "Just the ones" that had already been received into evidence. Because of her testimony in this respect, because the parties stipulated that she complied with the union contracts (including the one which became effective in June 1990) from November 1989 until October 1991, and because she was not asked in terms whether she received copies of any agreements, I infer that she received a copy of the "Benefit Agreements" and the "Inside Wireman" agreement on November 13, 1989, and received copies of the 1990–1993 and (perhaps) the 1993–1997 "Inside Wireman" agreements shortly after their execution.[7]

The 1987–1990 "Inside Wireman Agreement," and all subsequent "Inside Wireman" agreements executed by NECA and the Union effective through May 31, 1997, provided that the employer recognized the Union as the exclusive representative of all its employees performing work within the Union's jurisdiction. The 1987–1990 "Inside Wireman Agreement" was effective by its terms until May 31, 1990; and an "Inside Wireman Agreement" between NECA and the Union was effective by its terms between June 1, 1990, and May 31, 1993. A subsequent "inside Wireman Agreement" between NECA and the Union was effective by its terms between June 1, 1993, and May 31, 1997, at the earliest. Although the Union makes a practice of urging employers who sign "letters of assent" to join NECA, the General Counsel stated on the record that Respondent never joined NECA, and Respondent's counsel tacitly accepted that representation. However, from December 1989 to October 1991, Respondent abided by the then-effective bargaining agreements and made trust fund contributions for bargaining-unit employees.[8] In the 22-month period between December 1989 and October 1991, Respondent employed two or more employees during at least 12 of these months, including the last 4 months. Moreover, Stewart testified, in effect, that Respondent never gave NECA any written notice that Respondent had withdrawn from NECA Re-

[6] NECA Executive Director Andrew A. Porter credibly testified that when he receives letters of assent, they ordinarily bear a stamp by the Union's parent international; and that if no stamp was there, he would probably at least raise the issue of why the letter was not stamped.

[7] The record fails to show whether NECA routinely sends copies of newly executed bargaining agreements to employers who have executed current letters of assent. Cecil H. Satterfield Jr., who has been the Union's business manager since 1992, testified in July 1995 that "recently," "we" had sent some of the wage changes to the employers that are active but "I don't send them to the ones that are inactive." As discussed, infra, sec. III,C, the record shows that Respondent's file may have been placed in the Union's "inactive" files before the effective date of the June 1993–May 1997 bargaining agreements. However, Charles E. Graham, who has been the Union's business representative since about July 1992, testified, in effect, that as a matter of practice employers represented by NECA are provided with copies of the changes in the bargaining agreements referenced in the letters of assent signed by such employers.

[8] Some of the trust fund payments were made in the spring of 1992 for periods preceding November 1991.

spondent's November 1989 authorization to act as Respondent's bargaining representative.[9]

All the foregoing agreements required the Employer to notify the Union's business manager of any vacancies, and to hire all employees through the union hiring hall[10] addition, all of these agreements included the following provisions, not claimed to be unlawful (see, the first and third provisos to Sec. 8(e) of the Act):

> Assignment of Work. The subletting, assigning or transfer by an individual Employer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW or one of its Local Unions as the collective bargaining representative of his employees on any electrical work in the jurisdiction of this or any other Local Union to be performed at the site of the construction, alteration, painting or repair of a building, structure or other work will be deemed a material breach of this Agreement.

B. *Respondent's Use of Electricians and Helpers after October 1991*

1. Respondent's representations as to the status of the personnel used by Respondent

Stewart testified at one point that in 1990 and 1991 all of the electricians used by Respondent were employees, and that in 1992 all of them were subcontractors. She also testified that most of Respondent's employees in 1991 "came out of the Union." A position letter from Stewart to an NLRB field examiner on December 1, 1994, states, in effect, that Respondent had not used the Union's hiring hall since November 1991.[11] Elsewhere, she testified that between 1989 and the date of her testimony (July 25, 1995), Respondent had had no employees except for the 1993 Prince George's County retrofit job (described infra, sec. III,B,10) "And also, when I entered into the agreement with the Union." On June 30, 1994, she reported to the Internal Revenue Service that Respondent employed no employees. Respondent's counsel stated on the record that Respondent has had no employees since 1994, and that since 1994 all the people Respondent has brought on the job have been independent contractors. As will appear, as to the electricians used by Respondent, Respondent sometimes issued W-2 forms (income tax forms supposed to be issued to employees) and sometimes issued 1099 forms (income tax forms supposed to be issued to independent contractors). Stewart testified that in any particular year, she would issue W-2 forms or 1099 forms, but not both. As shown infra, among the 1099 forms she issued in 1994 is a form as to herself; she has been Respondent's president at all material times.

2. Charles Bryant and William Bowen (1991)

Respondent used the services of electricians Charles Bryant and William Bowen in 1991. Because the parties stipulated that before November 1991 Respondent abided by the bargaining agreement and made trust fund contributions for bargaining unit employees, and because Respondent never made any trust fund contributions for Bryant or Bowen, I infer that they were used by Respondent in November and/or December 1991. Respondent issued W-2 forms for Bryant and Bowen.

3. Debbie Williams (1992)

Respondent issued a 1099 form for 1992 as to Debbie Williams. Stewart testimonially described her as a "subcontractor." There is no other evidence as to her status or what work she did.

4. Keith Myers on the Herndon job in 1992

Since 1989, electrician Keith Myers has held a master contractor's license, and an electrical master's license, from Maryland, Virginia, and the District of Columbia; and an electrical contractor's license from Maryland and the District of Columbia. In addition, since before July 25, 1995, but a date not otherwise shown by the record, he has operated an electrical shop. In the summer of 1992, he finished off some electrical work for Respondent on a new restaurant or store in Herndon, Virginia. He worked about 10 hours during two evenings; and, pursuant to Myers' oral agreement with Stewart, was paid by the job (without fringe benefits) and not by the hour. The 1990–1993 bargaining agreement calls for hourly rates only.

5. The repair of a junction box in Rockville, Maryland, in 1992 or 1993

In late 1992 or early 1993, Pepco (which provides electrical power to the Washington, D.C. metropolitan area) sent one of its electricians, Dennis Reeves, to meet with SAS; show it the location of a junction box in Rockville, Maryland, which Respondent was supposed to repair; and see to it that the repair was made. The repair job, which was electrical work, was mostly performed by a man whose name does not appear in the record, although Stewart did show up on the job. Reeves credibly testified that the man said he worked for SAS. As this testimony was received without objection or limitation, I find it probative of the truth of the man's assertion to Reeves.[12] I find that the man was an employee of SAS.

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[9] As discussed, infra, sec. III,D,1, Respondent does contend that in November 1991, it gave the Union written notice that Respondent was terminating its agreement.

[10] Except that the Employer could hire temporary employees from other sources if the Union could not refer applicants within 48 hours of the Employer's request. Some of the other provisions in the hiring hall clauses are discussed, infra, fn. 31.

[11] More specifically, this letter states that in November 1991 Respondent wrote a letter to "the Washington, D.C. chapter of NECA terminating [Respondent's] November 13, 1989, agreement with them"; that NECA did not work in "Washington, D.C." until October 1994; and that when Respondent started its job in October 1994, "I assumed [Respondent] had no obligation to hire NECA workers because I had terminated the agreement with NECA." Because the agreement had been negotiated by the Washington, D.C. chapter of the National Electrical Contractors Association and on its face covers areas in addition to Washington, D.C., I attach no significance to her repeated reference to Washington, D.C. See also infra, sec. III, D,2. At the hearing, Stewart testified that she had never written such a letter to NECA.

[12] *Iron Workers Local 46*, 320 NLRB 982 fn. 1 (1996); *Today's Man*, 263 NLRB 332 (1982).

6. The Annandale job in 1993

In the spring of 1993, Respondent used electrician Lloyd Maxwell and helper Brian John Stanton, under Stewart's supervision, on a construction job in Annandale, Virginia. Maxwell, at least, worked there for 1-1/2 or 2 months and was paid by the hour; his wage rate was about $5 an hour below the rate prescribed by the 1990-May 31, 1993 bargaining agreement, and he received no fringe benefits. Maxwell was not referred by the Union to this or any other job he performed for Respondent. Maxwell signed no written employment agreement with Respondent with respect to the Annandale job. When he started the job, Stewart told him not to talk to the customer, but to refer the customer to Stewart if he had any questions. In connection with this job, Respondent issued 1099 forms to Maxwell and Stanton. Moreover, at least as to Maxwell, Respondent made no deduction for income taxes or social security.

7. The District of Columbia Board of Education job in 1993

In 1993, Respondent used electricians Lloyd Maxwell and Joe Malone, and (perhaps) a helper, to install or replace emergency lighting for the egress to a building used by the District of Columbia Board of Education. This job was overseen by Stewart, and lasted 3 weeks to a month. Malone and Maxwell received paychecks from Respondent reflecting wages of $17 an hour, at least $4.51 less than the union contract called for. At least as to Maxwell, Respondent made no social security or tax deductions, but merely gave him a 1099 form at the end of 1993. Maxwell did not sign any contracts or agreements with Stewart for that job, to which he was not referred by the union hall.

8. The District of Columbia residential job in 1993

In the latter part of 1993, Respondent used electrician Maxwell and helper Stanton on a 2-month job upgrading portions of the electrical system of a house in the District of Columbia. Respondent paid Maxwell $15 an hour and paid Stanton $10 an hour, without fringe benefits in either case. The wages paid to Maxwell were $6.45 less than those called for by the bargaining agreement; it is unclear whether Stanton was receiving lower wages than the agreement called for.[13] Maxwell, at least, was not referred out of the union hall.

9. The "heavy up" jobs in 1993 and 1994

In 1993–1994, Maxwell performed eight or nine service upgrades ("heavy ups") for Respondent, sometimes with Stanton as a helper. On the first one or two of these jobs, Maxwell was paid $25 an hour (more than the bargaining agreement called for, but without fringes). Then, Maxwell advised Stewart that he wanted to be paid $300 for each "heavy up, and she agreed. Thereafter, Respondent paid him $300 for each "heavy up," still without fringes. In 1994, Respondent issued a 1099 form for Maxwell.

[13] Apprentices were to be paid a percentage of the wage paid to journeymen, the size of the percentage being determined by the number of years of "School Completed." If Stanton had completed 1 year or less, he was being paid more than the bargaining agreement called for; otherwise, he was being paid less.

10. The Prince George's County retrofit work in 1993

In early 1993, Respondent, Plus Consulting Services, and RCD Electrical Services Division, Inc. (RCD) entered into an agreement to provide goods and services for the Prince George's County Energy Lighting Retrofit project; this project involved buildings in Upper Marlboro, Landover, and Largo, Maryland, and lasted about 3 months. This agreement called for Respondent to furnish labor supervision and all field labor, except that RCD was to supplement Respondent's field labor force with "additional qualified electricians on an 'as-needed basis'." Respondent and RCD agreed to set up a joint checking account for the purpose of paying, inter alia, payroll and payroll taxes incurred in the performance of the project; all checks written on this account were to require the signatures of both Stewart and RCD's president, Robert C. Damico. RCD was to "provide financial and administrative resources to facilitate [Respondents] performance"; Respondent was to pay RCD an "administrative fee" of 1.5 percent of the job cost.

Respondent issued W-2 forms for 1993 as to eight individuals (as well as Stewart) who performed work covered by the Prince George's County contract (Ronald Chivers, Daniel Fagga, Francisco Flores, Lloyd Maxwell, Keith Myers, Al My Nguyen, Cue N. Nguyen, and Hernandez Salvador).[14] Maxwell, at least, was not hired out of the union hall. The names of all of these individuals (as well as Stewart's name) appear on a payroll register which was set up as a file for Respondent, was attested to by Stewart, and was certified by RCD because it handled the administration. The electricians and helpers on the work covered by the RCD contract were paid by check. Their paychecks (including Stewart's) were signed by Stewart and Damico, and were drawn on an account called "S.A.S./RCD Inc. Electrical Services." Myers and Maxwell, at least, were paid by the hour. Myers was paid $25 an hour, and Maxwell was paid $23 to $25 an hour, which sums exceeded the amounts called for by the bargaining agreement; but neither man received any fringe benefits. When performing this work, Myers, at least, brought with him only the same tools he would take to any job. For this job, Myers had a written employment agreement, which is not in the record, with RCD. Respondent issued a W-2 form for each of the individuals who performed work covered by this contract, and on each such form gave Respondent's name as the employer. Stewart set a quota for that job of 125 fixtures per night, and said "something" on any night when that quota was not met. Stewart testified that each of these individuals was an employee.

11. Brian John Stanton (1994)

On April 18, 1994, Respondent (through Stewart) wrote a check to Stanton for $112. Stewart testified that Stanton received this check for a job in Virginia where he put in light tubes in an office building. On June 27, 1994, Respondent (through Stewart) wrote Stanton a check for $220. Stewart testified that there was a "possibility" that on that day, Stanton was working on a Pepco job. Stewart further testified that she wrote both of these checks as an accommodation to Maxwell, because he did not have a checking account. Her

[14] One of these, Chivers, may have been a statutory supervisor. I find it unnecessary to resolve this issue.

testimony aside, there is no evidence that Maxwell worked on the Virginia office building job, or that either he or Stanton worked on a Pepco job about late June 1994, or that Maxwell was at any time answerable for Stanton's pay on any job. Maxwell, a witness for the General Counsel, was not asked about either of these checks, and Stanton did not testify. As to the year 1994, Respondent did not issue a W-2 form as to Stanton or anyone else, nor did Respondent issue a 1099 form for Stanton, so far as the record shows.

12. Lorenzo Jewell (June 1994)

On June 30, 1994, Respondent (through Stewart) wrote a check for $220 to one Lorenzo Jewell, whom she testimonially described as a "contractor" for (according to the face of the check) "Pepco" work; this was not the Benning Road Pepco job (described infra, sec. III,B,15), but it may have been the Pepco preventive maintenance job (described infra sec. III,B,14). Respondent issued 1099 forms for 1994 as to Stewart and Jewell.

13. Joe Malone (July 1994)

On July 20, 1994, Respondent (through Stewart) wrote a check for $622.05 to Joe Malone for (according to the face of the check) "Sub-Wk." Stewart testimonially described Malone as a subcontractor" or a "contractor," and testified to the belief that the job in question was the Virginia office building job (above at sec. III,B,11). Respondent issued 1099 forms in 1994 as to Stewart and Malone.

14. The Pepco riser check, the Taste of D.C. Pepco job, and the Pepco preventive maintenance job, in 1994

During a weekend in the spring or early summer of 1994, Respondent used electrician Maxwell to check the power risers on a Pepco facility in downtown District of Columbia. Respondent paid Maxwell by the hour. A little later, Maxwell and Stewart performed a 1-day job installing a temporary service panel in a Pepco booth set up to demonstrate various Pepco improvements and devices to the public during a "Taste of D.C." show. Maxwell was paid $20 an hour, $1.45 or $1.70 less than the union contract called for, and received no fringe benefits. The union hall did not refer Maxwell to either of these jobs.

Thereafter, Stewart and four or five other electricians whom she had brought onto the job all performed electrical work on an 8-hour preventive maintenance job for Pepco in the District of Columbia. Stewart worked alongside the other electricians, but when they went from one location to the other she would say, "Come on, let's go over here and get this done and this is what you're going to do."

15. The Benning Road Pepco job in 1994

About early October 1994, Respondent reached an agreement with Pepco to perform a retrofit job on the light fixtures in the office area at a Pepco facility on Benning Road in the District of Columbia. This job was performed over a 3-month period in the fall and winter of 1994. All the personnel on that job were required to start work at (and not before or after) a particular hour, to end work at (and not before or after) a particular hour, and to work each of particular days of the week (and not on any other days).[15] If an electrician being used by Respondent on that job wanted to miss work or come in several hours late, he had to get in touch with Stewart, who would complain that the requested absence was putting her behind schedule to meet as far as finishing the job and was preventing her from meeting her quota as to the number of people on the job. Electrician Maxwell was sometimes late reporting to this job, because he was also working on another job elsewhere. On at least one occasion, when he had missed a night or two, Stewart told electrician Myers that Maxwell had given the excuse that his car had broken down, she was upset with him about not being there, and she was going to tell him not to bother to come back. Shortly thereafter, Maxwell quit. He had not obtained this job through the union hall.

While Respondent was performing this job, Stewart came to the job on a nightly basis, but she sometimes did not show up until after the electrical workers had started to work. She did not remain during the entire shift, but at the end of each shift she would return to make sure that the area had been cleared so that it could be used by Pepco office personnel during the day. Pepco supervisors were on the job throughout the period it was performed, and inspected the work performed by Respondent as a company, but Stewart supervised the electricians and helpers and inspected their work as individuals to see if they were doing what they were supposed to be doing. If she believed that things were not going the way they were supposed to be going, or if she felt that the electrical workers should be doing something different from what they were doing, she would talk to them about it. She would tell the electrical workers that they were expected to be finished with a particular floor or a particular building by a particular time, how much they were expected to do, and the extent to which the fixtures were to be retrofitted and cleaned. She regularly met with Pepco representative Reeves. At least initially, if Stewart was absent at the beginning of the shift, Reeves told the electrical workers where they were supposed to go. However, Stewart later told Reeves, who had been giving out what section was to be done each evening and made sure the material was there, that he was "running her people"; that they worked for her and not him; that they were to listen to her and not him; that he was just supposed to tell her what was to be done each evening; and that she would take care of telling them what to do. Thereafter, Reeves followed this practice unless she was not there, in which case he would tell the electricians and helpers where to go next. Eventually, she told Reeves that in her absence, Doc Graham (an electrician whom Respondent was using on this job) would act as Respondent's supervisor for the electricians and helpers on the job, Reeves was to tell Graham what to work on, and he would tell the others what to work on. However, Reeves did continue to inspect the work. The amount of time needed to install a fixture, and the ease of installing it, differed as to different areas. The area where

[15] The record fails to show whether the restriction on work outside the specified hours and days was initially imposed by Respondent or by Pepco. However, the job was being performed outside the working hours of the Pepco employees who were working in the office areas where the fixtures were located.

each electrician/helper team was to install fixtures on a particular day was determined by Stewart or (in her absence) by Doc Graham, whom Stewart described to the other personnel on the job as the "foreman" or "lead man." If a problem arose on the job, the electrician would talk to Stewart.

The electricians, whom Respondent was paying on the basis of the number of fixtures completed and who received no fringe benefits, kept track of how much they were doing individually, and reported this to Stewart. The work being performed on a piecework basis on this job was the same kind of work for which Respondent had paid on an hourly basis on other jobs, and was simple although somewhat hazardous. Materials were supplied by Respondent or Pepco. Electrician Maxwell brought to the job only his usual tools; electrician Myers also brought cleaning solution and a ladder. When Respondent needed to move its own materials from one location to another, Stewart generally used her own small pickup truck, but at least on occasion, electricians Myers, Doc Graham, and (perhaps) others used their own trucks for that purpose.

Before starting work on the job, electricians Doc Graham, Maxwell, Myers, and Vernon Turner—that is, all the electricians, except Chivers, whom Respondent used on the job—signed an agreement, drafted and tendered by Respondent, which is captioned "Subcontractor's Agreement" and reads, in part:

> This subcontractor's Agreement pertains to lighting systems modifications for [certain specified] buildings . . . for PEPCO. Deadline for completion of this project is scheduled for December 31, 1994. Work hours are: 5:30 p.m. to 1:30 a.m. Monday through Friday. Payment will be every two weeks.
>
> This Agreement states that [Respondent] has subcontracted work to [electrician's name] for PEPCO reference. The following conditions are to be met:
>
> 1. A copy of your insurance will be required for this project.
> 2. All subcontractors are responsible for their personnel (helpers).
> 3. Any changes in subcontractor's personnel, [Respondent] needs to know ASAP.
> 4. [Respondent] will provide everything for this project except tools, i.e. drills, etc.

Also, "subcontractors" were to install one baliast per fixture, were responsible for cleaning the lens cover inside fixtures, were to cut leads short for disposal of all baliast in drums, and were to sign a report every night. "Socket damage will be saved and counted for each and every day" (emphasis in original). Pepco was to provide drums and boxes. A "Price Work Pay Schedule" called for a particular dollar payment per fixture; and a "pricing schedule" was being prepared for occupancy sensors to be installed. The blanks called for the signatures of the 30 "Subcontractor" and of Stewart.

Respondent issued 1099 forms for 1994 as to at least eight individuals (Stewart, Doc Graham, John Cunningham, Jewell, Malone, Maxwell, Turner, and Myers). Myers, Maxwell, Doc Graham, and Turner, at least, worked on the Benning Road Pepco job. There is no evidence that Respondent issued a 1099 form as to Walter Harris, a helper on that job, who was selected and paid by Myers. Respondent filed no W-2 forms for the year 1994.

Stewart advised each of the electricians that he had the option of getting a helper who was to be paid by the electrician. At least one of the electricians initially decided that he would perform his work without a helper; but this electrician's work proceeded so slowly that he soon obtained a helper. Each electrician selected his own helper, and paid the helper out of what Respondent paid the electrician for each unit.

During the daily cleanup process, in which both the electricians and the helpers participated, Stewart and Graham assumed a supervisory role over the helpers, including Harris. On occasion, with electrician Doc Graham's prior permission, Stewart recruited his helpers to perform work in connection with loading, unloading, or cleaning trucks. So far as the record shows, none of Graham's helpers ever refused to perform the tasks called for by Stewart. A person on the job who wanted to use Maxwell's helper to move materials would always ask Maxwell, who left it to his helper's discretion; "[i]f he felt like helping or he wasn't busy, of course I'd let him help." On one occasion, when Maxwell expressed concern to Stewart about the effect on Maxwell's own piecework pay of his helper's unavailability because he was working elsewhere on the job, Stewart said that she would have given the helper something extra if she had known that he felt bad about having to do the work without getting extra money. On two occasions, Stewart asked electrician Myers whether she could use his helper, Harris, and Myers said, yes, if Harris agreed. On the first occasion, Harris agreed; on the second occasion, he said that he would not perform such tasks any more because he was not receiving extra pay for his extra work.

Respondent's counsel stated on the record that on this job, Respondent "hired independent contractors"; that "Those people, to the extent that they brought anybody on the job, were required to pay and work out the arrangements with them"; and that Stewart "had nothing to do with them."

C. *The Union's June 1994 Information Requests; the Union's Allegedly New Discovery that Respondent was Disregarding the Contract*

It is not unusual for electrical contractors who are bound by contracts with the Union to be dormant (at least as to electrical work covered by the contract) for periods of time—for example, because of financial reasons, or because they are performing work outside the Union's territorial or craft jurisdiction. Where the trust fund office advises the Union that a particular contractor has submitted no reports for some time, the Union may infer that this contractor is performing no work in the Union's jurisdiction, and file his records in the inactive files. As previously noted, Respondent's last contribution to the trust fund was made in the spring of 1992 for work performed in 1991. By early 1994, the Union's records in connection with Respondent had been put into the Union's inactive contractor files.

Inferentially about early 1994, a legal aide from union counsel's office went through 100 to 200 files which had been placed in the Union's inactive contractor files. Inferentially thereafter, Union Business Manager Satterfield requested Union Business Representative Charles E. Graham (not the same person as electrician Doc Graham) to go

through the inactive contractor files (inferentially, those which the legal aide had reported to be worthy of attention), ascertain if any of these contractors was actually performing work, and make sure that the contractors in those files who might in fact be active were abiding by their bargaining agreements. Then, Graham gave Satterfield a list of about 30 employers whose files had been placed in the Union's inactive contractor files but contained no letters purporting to terminate the bargaining agreement, and who Graham felt might be active within the Union's geographical jurisdiction. After he and Satterfield went through these 30 files, Satterfield requested counsel to draft a letter to be sent to "several" contractors, who he suspected might be active within the Union's jurisdiction, requesting information about their operations.

Respondent was among the contractors to whom such a letter was sent. The letter to Respondent, which letter was signed by Satterfield and dated June 1, 1994, stated, inter alia, that Respondent's letters of assent authorizing NECA to represent Respondent were current, that Respondent remained bound to the Inside Wireman and Residential agreements, and that the agreements required Respondent to utilize the Union's hiring hall for its manpower needs. The letter went on to state that the Union currently had qualified journeymen and apprentices eligible for referral. The letter offered to provide Respondent, on request, a copy of the current bargaining agreement. In addition, the letter requested that if during the last 3 years Respondent had performed electrical work within the Union's territorial jurisdiction or had subcontracted electrical work, Respondent provide the Union with the following information: (1) the location and duration of all jobs where electrical work was or is being performed or has been subcontracted; (2) the names and classification of all employees performing electrical work; (3) the wage rates and fringes being paid to such employees; and (4) as to any electrical work subcontracted during this period, a description of the work, the location and duration of the job, and the identity of the subcontractor. The letter stated that such information was necessary in order for the Union to monitor contract compliance and to enforce the contract if it had not been adhered to. The parties stipulated that if, but only if, Respondent is bound by the bargaining agreement effective between June 1, 1993, and May 31, 1997, the requested material is necessary and relevant to the Union's performance of its duty as the collective-bargaining representative.

The Union never received a response to this June 1 letter. By certified mail, return receipt requested, Satterfield sent the Respondent a copy of the June 1 letter, under a covering letter dated June 23, 1994, which stated, inter alia, "Absent a response within seven (7) days from the date of this letter, we will initiate the necessary legal steps to compel a response to the information request as well as adherence to the collective bargaining agreements." Respondent received this letter on June 29, 1994.

The Union never received a written response to either letter. However, on August 3 Stewart telephoned Satterfield's office. The telephone was answered by his administrative assistant, Nancy Gladwell, who informed Stewart that he was not in the office. Stewart, who sounded very upset, stated that she was telephoning Satterfield because of the June 1 and 23 letters (which Gladwell had typed), said that it was very important that Satterfield return Stewart's call, and left her name and telephone number. When Satterfield returned to the office later that day, Gladwell gave him Stewart's name and telephone number, said that she had sounded very upset, and further said that Stewart had said that it was important that he return the call. Later that day, Satterfield returned Stewart's call. She said that she had received Satterfield's letters and was very upset. Satterfield's contemporaneous notes of what she said during this conversation read as follows

> Problems with Local 26
> Sounds like—I have not used [contract hiring hall?] union electricians
> Local 26 sends [her] bad electricians and she will cancel her agreement if she wants to and hire whoever she pleased. Get [your] lawyer or what—you don't scare me.

On September 6, 1994, the Union filed a charge which alleged, inter alia, that Respondent had violated Section 8(a)(1) and (5) "by failing to adhere to the terms and conditions of the Inside Wireman Agreement, and by otherwise repudiating its collective-bargaining agreement with [the Union]." For reasons not clear in the record, Respondent may not have received this charge until November 1, 1994. On December 23, 1994, Respondent received the original complaint, which alleged, inter alia, that at all material times, NECA had been authorized by Respondent to bargain collectively on its behalf; that about January 27, 1990, Respondent had entered into a letter of assent whereby Respondent agreed to be bound by the existing collective-bargaining agreement between the Union had NECA and to such future agreements; that about May 14, 1993, NECA and the Union had entered into a bargaining agreement effective between June 1, 1993, and May 31, 1997; and that Respondent was bound by that agreement. Respondent's answer to the complaint, which answer was signed by Stewart and hand-delivered on January 23, 1995, averred, inter alia, that Respondent was "not a party to, has never seen, and has no knowledge of" the May 14, 1993 agreement; denied[16] that NECA had at all material times been authorized by Respondent to bargain collectively on its behalf, "in that Respondent mailed a 'Written Notice of Termination' of the January 29, 1990 [sic] Letter of Assent on November 1, 1991, to [the Union; a] copy of this letter is attached"; and averred that in accordance with this attached alleged letter, Respondent had terminated its agreement with the Union no later than April 1, 1992. The alleged letter thus referred to is discussed infra, sec. III,D,1.

During a telephone conversation (inferentially, initiated by Stewart) about January 1995 with NECA Executive Director Porter, Stewart referred to the Union's having initiated efforts to hold Respondent to the agreement, said that she had been dissatisfied with her relationship with the Union, and said that she was no longer a signatory with the Union. Porter suggested that she get competent legal advice. Prior to this conversation, Stewart had never told Porter that she was withdrawing or attempting to withdraw from NECA or sent a letter withdrawing. NECA does not take the position that Respondent has withdrawn its letter of assent designating NECA as Respondent's bargaining representative.

[16] The answer refers to the "May 14, 1983 agreement"; the date is obviously a typographical error.

D. *Analysis and Conclusions*

1. Whether Respondent was bound between November 13, 1989, and May 31, 1997, by the bargaining agreements executed by the Union and NECA

The terms of the letter of assent require the conclusion that Respondent was bound by NECA's contracts with the Union between November 13, 1989 (when Stewart signed the letter of assent on Respondent's behalf) and May 31, 1990, the expiration date of the NECA contract in effect on November 13, 1989. *Baker Electric*, 317 NLRB 335 (1995); *Industrial TurnAround Corp.*, 321 NLRB 181 (1996). Nor can there be any question that Respondent was bound by NECA's contracts with the Union between June 1, 1990, and May 31, 1993. Such a conclusion is required by the terms of the letter of assent and by the absence of any claim or evidence that Respondent gave written notice to the NECA and/or the Union, at least 150 days before the expiration of the agreement which expired on May 31, 1990, that Respondent had terminated the authorization to NECA contained in the letter of assent. See *Baker Electric*, supra; *Industrial TurnAround*, supra. The fact that the 1989–1990 and 1990–1993 agreements would have been unlawful but for Section 8(f) of the Act did not privilege Respondent to disregard or repudiate them before they had expired by their terms. *Operating Engineers Local 150 (R.J. Smith Construction Co.) v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

Moreover, I agree with the General Counsel and the Union that Respondent was bound by the June 1993-May 1997 contract executed by NECA and the Union. Respondent was bound by this successor agreement so long as it was executed or renewed while the Letter of Assent was still effective; *Baker Electric*, supra. Further, this Letter of Assent was by its terms effective until terminated by timely written notice by Respondent to both NECA and the Union; see *McDaniel Electric*, 313 NLRB 126 (1993). Stewart admitted, in effect, that she was aware of the need to give written notice of termination to NECA, admitted, in effect, that she had never given such notice,[17] and at the hearing sought to explain this omission on the ground that she did not know where she should send it. However, in December 1994, she advised the Regional Office (although she was admittedly in error) that she had written a letter in November 1991 to NECA "terminating [Respondent's] November 13, 1989 agreement with them" but could not find her file copy. Moreover, in response to a subpoena duces tecum issued at the General Counsel's behest, Stewart produced at the hearing letters to Respondent from NECA dated September 5 and December 6, 1991, whose letterhead included NECA's address and telephone number (both of which have remained unchanged at all times relevant here); and courtesy copies to Respondent of two letters from Respondent's counsel to NECA, dated September 11 and October 17, 1991, both of which bore NECA's correct address. Moreover, in September 1990 or September 1991, Stewart attended an open house at NECA's office.[18] In view of the foregoing, I do not believe her testimony that her admitted failure to give written notice to NECA was due to ignorance of its address. Accordingly, I need not and do not consider whether such ignorance would have rendered such notice unnecessary. I note, however, the absence of any claim or evidence that she ever asked the Union for NECA's address.

In view of the foregoing, it is immaterial whether Respondent gave timely notice to the Union. In any event, I agree with the General Counsel and the Union that Respondent did not give the Union timely notice either. The complaint alleges, infer alia, that "At all material times, [NECA] has been authorized by Respondent to bargain collectively on its behalf with the Union concerning wages, hours and other terms and conditions of employment." In response to this allegation, Respondent's answer, which was signed by Stewart, states: "Denied in that Respondent mailed a 'Written Notice of Termination' of the . . . Letter of Assent on November 1, 1991, to [the Union]. A copy of this letter is attached." Respondent's answer further alleged that "In accord with the . . . Letter of Assent, the Respondent's November 1, 1991 'Written Notice of Termination' terminated its agreement with the Union no later than April 1, 1992."[19]

The document attached to Respondent's answer will be referred to here as the "attachment." This Attachment was printed by a word processor on a sheet of Respondent's letterhead stationery, which is more completely described infra, and Stewart signed the Attachment in ink after it was printed. The attachment purports to be a letter dated November 1, 1991, from Stewart to Widener, correctly sets forth his business address as "6220 Kansas Avenue, Northeast/Washington, D.C., 20011,"[20] and reads as follows:

> Re: Written Notice of Termination
>
> Dear Mr. Widener:
>
> SAS Electrical Services, Inc. is terminating its agreement because the Union is not holding to their agreement. What SAS Electrical Services, Inc. finds disturbing is that a licensed union electrician would silently

[17] NECA executive Director Andrew A. Porter credibly testified that NECA's files contained no letter from Respondent purporting to withdraw from the letter of assent or from one of the contracts pursuant to the letter of assent. Also, he gave honest testimony that he had never received any oral communications from Respondent to that effect.

[18] In addition, NECA's address was on the letterhead of letters from NECA to Stewartdated February 6, 1990, and January 30, 1992. The record fails to show how long, if at all, she retained copies of these letters.

[19] A December 1994 letter from Stewart to the Board's Regional Office expresses the opinion that a November 1, 1991 letter of termination to NECA from Stewart (which she testified was never sent) "would have terminated the agreement effective November 13, 1992." Respondent's July 24, 1995 answer (also signed by Stewart) to the amended complaint alleges that Respondent terminated "the agreement, and relationship, with [the Union] more than three years ago." I perceive no basis for any contention that a November 1, 1991 letter to the proper party or parties would have terminated the June 11, 1990-May 31, 1993 bargaining agreement either on April 1, 1992, prior to July 24, 1992, or on November 13, 1992.

[20] Letters sent by Brooks to NECA on September 11 and 17, 1991, are correctly addressed to "4200 Evergreen Lane, Suite 335/Annandale, Virginia 22203," and state that courtesy copies were sent to, inter alia, "Mr. Randolph Scott [President], Local 26, IBEW." I am at a loss to understand Brooks' assertion, on the first day of the hearing (July 24, 1995), that NECA and the Union had the "same office location."

witness the negotiations of work to be performed, knowing that he had installed the work himself.

SAS Electrical Services, Inc. will not compensate anyone for work performed without our authorization first and foremost (See attachments).

If you have any questions, please don't hesitate to call or write.

. . . .

Enclosures[21]

I assume, without deciding, that if mailed to the Union about the date it bears (November 1, 1991), a letter so phrased would under the letter of assent be adequate notice to the Union of an intention to terminate Respondent's authorization to NECA to bind Respondent to the contract which went into effect on June 1, 1993, and is to remain in effect until May 31, 1997, at the earliest. However, I conclude that this letter was never in fact mailed.

On being shown the attachment (which is dated November 1, 1991), John P. Widener Jr., who is the addressee named there and who was the Union's business manager between July 1989 and the end of June 1992, testified on the first day of the hearing (July 24, 1995) that he did not see such a document until about a week before the hearing. The assumption that underlies Widener's testimony in this respect—namely, that in mid-1995 he would have remembered seeing such a document in late 1991—is rendered at least tenable by the at least tenable testimony of Widener, Gladwell (who as the Union's administrative assistant since 1980 has maintained all of the records for the Union's agreements with contractors and has opened virtually all of the business manager's mail), Charles E. Graham (the Union's business representative since 1992), and Satterfield (the Union's business manager since 1992) that the receipt of such a letter from a contracting employer is an unusual event which creates concern within the Union's business office (as Graham put it, a letter of termination or withdrawal causes "havoc in the hall"), would be widely discussed within the Union, and would cause the union business manager to refer the letter to counsel, none of which events took place in 1991 in connection with Respondent. Further, Graham testified that he did not see that letter until January 23, 1995, when he received a copy from Stewart via Federal Express. Moreover, Gladwell, Graham, and Satterfield all testified that no such letter is included in the file which the Union maintains in connection with Respondent. Furthermore, as noted above (sec. III,C), on August 3, 1994, almost 3 years after Stewart allegedly mailed the alleged termination letter to the Union, Stewart told Satterfield that she "will cancel her agreement if she wants to"—phrasing wholly inconsistent with any belief by her that she had already cancelled Respondent's agreement with the Union and was not currently bound by any such agreement.

Moreover, Stewart's testimony in connection with her preparing and allegedly mailing this letter contains significant inconsistencies, both internal and when considered in light of the physical evidence. Stewart credibly testified that she prepared the language of that letter by herself. She went on to testify that she typed it up herself, on a computer; that she herself put it into a manila envelope with the "enclosures"; and that she herself mailed this envelope. She testified that in November 1991, when she allegedly mailed to the Union a letter which consisted of the quoted material, she had the computer generate a total of two and only two copies of the letter; that she wrote her signature on and mailed to the Union one of these copies; that she wrote her signature on the other and put it in her file; and that it was this second, computer generated file copy which she physically attached to Respondent's January 1995 answer. After Stewart so testified, the General Counsel showed her a document which (according to Stewart's testimony) had been in Stewart's file folder since November 1, 1991, and which was marked (and eventually received into evidence) as General Counsel's Exhibit 37. General Counsel's Exhibit 37 bears the same computer generated material as the attachment, in what appears to be the same computer type face, and bears Stewart's signature in ink on the face of the document. Nevertheless, after inspecting General Counsel's Exhibit 37, Stewart reiterated her testimony that only two copies of this alleged letter had been generated by her computer and physically signed by her in November 1991, and went on to testify that she had not physically signed any additional copies of that alleged letter. This testimony by Stewart cannot be reconciled with the presence in her file of one copy of the computer generated material after she had allegedly attached one copy to her January 1995 answer and had allegedly mailed the only other copy to the Union in 1991. Moreover, General Counsel's Exhibit 37 could not have been generated by the computer in November 1991, because the computer generated material in this document is printed on stationery on which is printed, among other things, Respondent's current fax number (703–709–8170),[22] which Respondent did not acquire until 1993 at the earliest.[23] Furthermore, although Stewart testified that she did not acquire a fax number until 1993 at the earliest, and

[21] Stewart testified that the "Enclosures" consisted in their entirety of one August 1991 letter (which is not in evidence) to Union President Randolph Scott, describing what had "happened with" herself, Respondent, and employee Robert Truslow, whom the Union had referred to Respondent after Respondent had requested him by name. Truslow filed a grievance against Respondent in or before August 1991, claiming nonpayment for certain work, and a criminal complaint against Stewart in September 1991, whose alleged basis is not shown in the record, and which was dismissed about mid-October 1991. Respondent initially defended against the grievance on the ground that at least some of the work in question had not been authorized by it, and later added the defense of setoff based on damages allegedly suffered in consequence of the criminal charge. The subsequent history of this matter is immaterial to the issues in the instant case.

[22] This is the fax number which is printed on the bottom line of the first page of Stewart's letter to me on Respondent's printed letterhead stationery dated September 26, 1995 (ALJ Exhs. 3 and 1), on the facsimile transmittal sheet of that letter (ALJ Exh. 1), and on the bottom line of the first page of Stewart's letter to me on Respondent's printed letterhead stationery dated September 6, 1995 (G.C. Exh. 46).

[23] The most likely date is about November 1994. Thus, the record includes two undisputedly authentic documents (G.C. Exhs. 13 and 15), on Respondent's letterhead stationery, which bear the printed fax number 703–787–5724 (see infra, fn. 24) and are dated October 25, 1994. An undisputedly authentic letter to a Board agent (G.C. Exh. 40) from Respondent dated December 1, 1994, is on letterhead stationery which is identical to the stationery used in G.C. Exhs. 13 and 15, except that the last 7 numbers of a printed fax number have been whited out and the handwritten numbers "709–8170" (the last 7 numbers of Respondent's current fax number) substituted therefor.

although two undisputedly authentic letters to the Union and its trust office, respectively (G.C. Exhs. 38 and 39) dated July 17, 1991, and April 27, 1992, were faxed by Respondent from fax machines which Respondent admittedly never owned, the attachment, which (Stewart testified) was prepared on November 1, 1991, and which the Regional Office received on January 24, 1995, is printed on letterhead stationery which bears the same printed fax number (703–476–5724), as does the letterhead stationery used in two undisputedly authentic 10 documents (G.C. Exhs. 13 and 15) prepared by Respondent and dated October 25, 1994. Moreover, the letterhead stationery which Respondent used in preparing undisputedly authentic 1991 and 1992 documents both before and after the date (November 1, 1991) on the attachment and on General Counsel's Exhibit 37, unlike the attachment and General Counsel's Exhibit 37, does not include a fax number (see G.C. Exhs. 38, 20, 19, and 41, dated July 17 and August 16, 1991, April 30 and October 1, 1992 respectively).[24] Also, the first three of these undisputedly authentic letters use a logo consisting of an old-fashioned telephone, and the fourth (G.C. Exh. 41, dated October 1, 1992) has no logo;[25] whereas the logo on General Counsel's Exhibit 37 and the Attachment is a circular logo used on a number of undisputedly authentic documents dated between October 25, 1994, and September 26, 1995 (G.C. Exhs. 13, 15, 40, and 46, ALJ Exh. 3). Although Stewart testified, in effect, that she sometimes uses Respondent's old letterhead stationery even after receiving new and different letterhead stationery; it seems unlikely that she used old-style stationery on undisputedly authentic documents prepared in July 1991, August 1991, April 1992, and October 1992, while using, in the alleged November 1991 preparation of the questioned "Attachment" and the questioned General Counsel's Exhibit 37, the new style stationery utilized in undisputedly authentic exhibits whose earliest other use shown by the record is October 25, 1994 (see G.C. Exhs. 13 and 15). Indeed, of the documents produced by Stewart pursuant to the General Counsel's subpoena, which called for, among other things, all correspondence with customers between 1989 and July 1995, the only document bearing a circular logo and a date prior to 1993 is the questioned General Counsel's Exhibit 37 (with a November 15, 1991 date).

In view of the foregoing, I credit the testimony that the Union never received the alleged letter; discredit Stewart's testimony that she wrote it, and mailed it to the Union, about November 1, 1991 (the date it bears); and find that this letter was not sent to the Union at any 20 material time.[26]

Accordingly, I find that Respondent was bound by the 1993–1997 bargaining agreement executed by the Union and NECA.

2. Whether Respondent's employee complement at relevant times was sufficient to render an unfair labor practice any alleged failure to honor the then current bargaining agreement

The undisputed evidence shows that beginning on a date which preceded January 1, 1993 (the date when, the complaint alleges, Respondent commenced its unfair labor practices), Respondent has failed to honor the collective-bargaining agreements which bound Respondent between 1990 and 1997. Such conduct by Respondent violated Section 8(a)(5) and (1) of the Act unless the evidence shows that the contract unit was a stable one-employee unit. *McDaniel Electric*, supra at 127. Where the evidence so shows—"In short, when the employee complement at issue has no 'collective' character, and thereby has no meaningful relationship to the practice and procedure of collective bargaining, it is altogether appropriate for the Board to withhold its statutory . . . unfair labor practice process." Id. at 127. However, in determining the existence vel non of a stable one-man unit in the construction industry, in which Respondent is admittedly engaged, the Board takes into account the fact that employment fluctuations are typical in that industry. Id. at 127. On the basis of these standards, as they have been applied in the construction industry, I agree with the General Counsel and the Union that the "stable one-man unit" defense is not available to the Respondent here.

Thus, it is undisputed that during the 22-month period between December 1989 and October 1991 (the last month for which Respondent made payments into the trust fund) Respondent employed at least two employees during each of 13 months (as well as at least one employee during each of 4 months). Although there is no evidence that Respondent ever employed more than one employee at any given time after October 1991 until the spring of 1993, this hiatus does not establish that the reduction in Respondent's work force was other than temporary, in view of Respondent's subsequent operations.[27] Thus, in early 1993 Respondent used at least 6 admitted employees on a 3-month retrofit job for Prince George's County (above, sec. III,B,10). Moreover, also in

[24] Stewart testified that the 703–476–5724 fax number which was printed on the stationery used in her October 1994 letters and in her alleged November 1991 attachment was the number of the fax machine of an "associate" (Roger Sherman, no kin to me) who lived in Reston, Virginia (a municipality very near Herndon, Virginia, where Stewart lives and conducts her business). Stewart went on to testify that she started using his fax machine before 1992. Although testifying that Respondent had printed a fax number on its stationery in order to enable others to fax items to Respondent, Stewart further testified that before acquiring a fax machine about 1993, she did not follow the practice of receiving faxed messages "because I didn't have a fax, and it cost too much to go around receiving fax"; and that she used Sherman's fax machine, for transmitting or receiving documents, less often than once a week and, perhaps, only a couple of times a year. She went on to testify that she did not use his fax machine to send out the July 1991 and April 1992 letters because "I wouldn't go to his house every time I wanted to do a fax . . . wherever I was at the time, that's where it was faxed from." In view of Respondent's action in printing the fax number 703–478–5724 on its letterhead stationery, I infer that Stewart at least received messages on this fax machine more frequently than she testimonially admitted.

[25] Stewart testified that Respondent obtained this logo-less stationery by "opaquing out" the telephone logo on Respondent's earlier stationery and then making copies at a "copy place."

[26] Accordingly, I need not and do not consider Respondent's claim that a written notice (sent by ordinary mail) to terminate the letter of assent is rendered sufficient by the 1990–1993 bargaining agreement, a separate document which provides that "Any notice required or appropriate to be given to any party, committee, Board, or Employee, in accordance with the terms of this Agreement shall be in writing and mailed first class, postage prepaid, to the party to whom notice is required to be given at its address of record.

[27] See *McDaniel Electric*, supra at 127; *Wilson & Sons Heating & Plumbing*, 302 NLRB 802 (1991).

1993, Respondent used one electrician and (for 15 at least part of this period) one helper on an Annandale construction job which lasted 1-1/2 and 2 months (above, sec. III,B,6); used at least two electricians and (perhaps) a helper on the District of Columbia Board of Education job, which lasted 3 weeks to a month (above, sec. III,B,7); and used one electrician and one helper on a District of Columbia residential job which lasted 2 months (above, sec. III,B,8). Although the dates (other than the year) of these three 20 jobs are not shown by the record, the fact that electrician Maxwell worked on all of them shows that they were performed over a period of 4 or 5 months. Moreover, because these electricians and helpers were paid by the hour, and there is no evidence (other than Stewart's testimonial claim) that they were independent contractors, I find that they were employees. *Nelson Metal Fabricating*, 247 NLRB 730, 733 (1980), enfd. 639 F.2d 772 (3d Cir. 1980). Similarly, in early 1994, Respondent used one electrician on a Pepco job, and one electrician and one helper on another 1-day Pepco job, for which they were paid by the hour and as to whom there is no evidence (other than Stewart's testimonial claim, reiterated by Respondent's counsel) that they were independent contractors (above, sec. III,B,14). Accordingly, I find that on these jobs they were employees. *Nelson Metal*, supra, 247 NLRB at 733.

Remaining for consideration is the status of the electricians and helpers on the Benning Road Pepco job performed during about the last 3 months of 1994. Initially, I note Stewart's testimony, in effect, that one of the electricians whom Respondent used on this job (shivers) was on Respondent's own payroll. Accordingly, I find at this point that Respondent employed at least one unit employee on this job.[28] Determination as to whether the other electricians whom Respondent used on the job were in Respondent's employ or were independent contractors turns on whether Respondent had the right to control the work, not only as to the result to be accomplished by the work, but also as to the manner and means by which that result is accomplished; it is the right and not the exercise of control which is the determining element. See generally *City Cab Co. v. NLRB*, 623 F.2d 261, 264 (D.C. Cir. 1980); *NLRB v. A. S. Abell Co.*, 327 F.2d 1, 3–4 (4th Cir. 1964); *Standard Oil Co.*, 230 NLRB 967 (1977); and *Robbins Engineering*, 311 NLRB 1079, 1083 (1993).

On the basis of these standards, I conclude that the electricians whom Respondent used on the Benning Road Pepco job were not independent contractors but, instead, were employed by Respondent. Thus, although Stewart may not have been responsible for the requirement that all work be performed within particular hours of the day, she—and she alone—was responsible for the requirement that the personnel used by Respondent work during all of these hours, without taking time off when they chose. The area where each two-man crew installed fixtures on any particular day—a factor which affected how much work the crew could complete and, therefore, what the electrician on that crew was paid—was wholly controlled by Stewart or (in her absence) by Pepco representative Reeves. Stewart told Reeves that she, and not he, was to take care of telling the electricians what to do; and later, that electrician Doc Graham was Respondent's supervisor and that instructions about what the electricians were to work on were to be given by Graham (not Reeves) after Reeves told Graham what to work on. Stewart advised both Reeves and the personnel used by Respondent on that job that electrician Doc Graham was the other electricians' supervisor, foreman, or lead man. The "Subcontractor's Agreement" itself contained rather detailed specifications as to what the "subcontractor" was to do. The electricians provided no materials for the job, and brought to the job very few items other than the tools of the trade. I conclude that on that job, Respondent had the right to control the manner and means by which that job was performed; and that, therefore, the electricians on that job were not independent contractors but, instead, were employed by Respondent, albeit on a piecework basis. I attach no weight to Respondent's action in issuing as to the electricians IRS forms (Form 1099) which are supposed to be issued with respect to independent-contractors rather than employees, in view of Respondent's action in issuing a 1099 form for Stewart, who, as Respondent's president, obviously enjoys as to it employment status and not independent contractor status. Further, I conclude that the electricians were statutory employees, because their power to hire helpers (the electricians' only even arguable supervisory power) was possessed in their own interest alone, and each helper was paid by the electrician who hired him. See *World Theatre Corp.*, 316 NLRB 969 (1995); *Mission Foods Corp.*, 280 NLRB 251 (1986). In any event, a determination that the helpers were hired by the electricians in Respondent's interest, and therefore, that electricians were statutory supervisors, would require the further conclusion that the helpers were statutory employees of Respondent.

For the foregoing reasons, I conclude that the evidence fails to show the existence of a stable one-man unit which is not collective in character. *McDaniel*, supra at 127; *Wilson & Sons*, supra at 803. In any event, I conclude that such a defense would not be available to Respondent here. I so conclude because, if the persons used by Respondent to perform electrical work had in fact been independent contractors, assigning them to this work would have been a "material breach" of Respondent's lawful contractual undertaking not to sublet, assign, or transfer unit work to a person who did not recognize an IBEW affiliate as the collective-bargaining representative of his employees. Respondent should not be permitted to escape what would otherwise be its obligation to honor its collective-bargaining agreements on the basis of a situation created by a material breach of such agreements.

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to honor collective-bargaining agreements with the Union. Moreover, because during this period Respondent (without the Union's consent) paid some of the unit employees by the piece (rather than by the hour, as required by the bargaining agreements), paid

[28] This would be true if Chivers exercised supervisory powers with respect to electricians (as the record suggests) but electricians were (as Respondent contends) independent contractors rather than employees. *Illinois State Journal-Register, Inc. v. NLRB*, 412 F.2d 37, 43–44 (7th Cir. 1969); *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 935–936 (9th Cir. 1981), cert. denied 455 U.S. 1017 (1982); *Fleet Transport Co.*, 196 NLRB 436, 438 fn. 6 (1972); *Eureka Newspapers*, 154 NLRB 1181, 1185 (1965); and *Mourning v. NLRB*, 559 F.2d 768, 770 fn. 3 (D.C. Cir. 1977). If employee status as to Respondent was possessed by the other electricians and/or the helpers on this job, whether Chivers exercised supervisory power with respect to them does not affect the result in the instant case.

some unit employees at a lower hourly rate than required by the bargaining agreements, failed to hire all its unit employees through the union hiring hall,[29] and failed to make payments to the union benefit funds, I find that Respondent made unilateral changes in wages and working conditions during the effective terms of collective-bargaining agreements, in further violation of Section 8(a)(5) and (1). *Wilson & Sons*, supra at 806.

As to the date on which such violations commenced, I accept the January 1, 1993, date set forth in the complaint in its final form. An amendment to the complaint effected on the second day of the hearing, and 2 months before the hearing was closed, substituted this date for March 6, 1994, 6 months before the charge was filed on September 6, 1994. When granting over the opposition of Respondent's counsel the motion for leave to amend the complaint, I stated that my action was without prejudice to his right to urge Section 10(b) of the Act as a defense. Although Respondent's counsel at that time stated that he opposed the motion to amend "in part" because of the statute of limitations, I conclude that his failure to urge that defense at any time thereafter has effected a waiver thereof. *Public Service Co. of Colorado*, 312 NLRB 459, 461 (1993); *Helnick Corp.*, 301 NLRB 128 (1991).

In any event, such a defense would have no merit. The limitations period does not begin to run until the party filing the charge knew or should have known that an unfair labor practice has occurred; see cases cited infra footnote 30. The burden of showing that the charging party knew or should have known this rests on the party which raises the affirmative defense of Section 10(b). *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). A casual examination of the language used by recent decisions in this area has left me uncertain as to the precise extent of this burden. However, such precedents do establish that Respondent would have to show, at the very least, either that the Union knew, more than 6 months before filing its charge, that Respondent was dishonoring the bargaining agreements, or that in the exercise of reasonable diligence the Union should have known this more than 6 months before filing the charge.[30] No such showing has been made.

Thus, Satterfield, who was the Union's business manager between about July 1992 and the time that he testified in July 1995, credibly testified that he had had no knowledge that Respondent was performing work within the Union's jurisdiction until "after we had sent the [June 1994] letters and after they respond" (inferentially, referring to Stewart's August 3, 1994 telephone call to Satterfield, above, sec. III,C), when the Union received reports from other sources about Respondent's business operations. Satterfield further credibly testified that he had never been notified by any member of the Union that Respondent was performing work. Further, it is not unusual for contractors (especially small or new ones) to become temporarily or permanently inactive for financial reasons, or to perform work outside the Union's trade or territorial jurisdiction. Such inactivity is usually inferred by the Union when its trust office advises it that no reports had been made to the trust office by a particular contractor. Upon receiving such information from the trust office, the Union puts the contractor's file into the Union's inactive files; as previously noted, the Union's 1994 investigation of these files disclosed that the overwhelming number of the contractors in question were in fact inactive. Moreover, there is no evidence that Respondent used the Union's referral service after 1991; rather, the evidence indicates that Respondent did not use that service. Also, Respondent failed to reply to either of the Union's June 1994 requests for information which would have disclosed whether, since June 1991, Respondent had been an active contractor which was honoring the 1990–1997 bargaining agreements. I conclude that Respondent has failed to show that the Union knew or in the exercise of reasonable diligence should have known, more than 6 months before filing its charge in September 1994, that Respondent was committing unfair labor practices.

3. Whether Respondent violated Section 8(a)(5) and (1) by failing to honor the Union's request for admittedly relevant information and by dealing directly with unit employees

The parties stipulated that if Respondent was bound by the 1993–1997 bargaining agreement, the information which the Union requested in its June 1, 1994 letter to Respondent is necessary and relevant to the Union's performance of its duty as the collective-bargaining representative. In view of my finding that Respondent was bound by that bargaining agreement, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide this information. *A-Plus Roofing*, 295 NLRB 967, 970–971 (1989); *Oliver Insulating Co.*, 309 NLRB 725, 726 (1992), enfd. 995 F.2d 1067 (6th Cir. 1993); *Jervis B. Webb Co.*, 302 NLRB 316 (1991); *Audio Engineering*, 302 NLRB 942, 943–944 (1991); and *Dake Structural & Rebar Co.*, 293 NLRB 649, 652 (1989). Moreover, in view of my finding that Respondent was at all material times bound by a bargaining agreement with the Union, I find that Respondent violated Section 8(a)(5) and (1) by dealing directly with unit employees about terms and conditions of employment on the Benning Road Pepco job (above at sec. III,B,15). *Wilson & Sons*, supra at 803–804, 814.

CONCLUSIONS OF LAW

1. Respondent is an employer in the construction industry, and is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[29] See above at sec. III,B,1. Electricians Maxwell and Myers testified in terms that some or all of their jobs with Respondent were obtained without the use of the hiring hall.

[30] See, e.g., *Land Air Delivery, Inc. v. NLRB*, 862 F.2d 354, 360 (D.C. Cir. 1988), cert. denied 493 U.S. 810 (1989) "knows or has reason to know that an unfair labor practice has occurred"); *John Morrell & Co.*, 304 NLRB 896, 899 (1991), affd. 998 F.2d 7 (D.C. Cir. 1993) ("clear and unequivocal notice—either actual or constructive—of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party know or should know that his statutory rights have been violated"); *Baker Electric*, supra at 346 ("clear and unequivocal notice of a violation of the Act . . . [whether the employer's] prior conduct or noncompliance was sufficiently bald to put the Union on notice of its intent to repudiate" the bargaining agreement"); *Leach*, supra at 991 ("clear and unequivocal notice of a violation of the Act"); *Mine Workers Local 17*, 315 NLRB 1052 (1994) ("actual or constructive notice of the unfair labor practice"); *Moeller Bros. Body Shop*, 306 NLRB 191 (1992) (charging union "chargeable with constructive knowledge by its failure to exercise reasonable diligence").

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: all employees performing electrical construction work within the jurisdiction of the Union.

4. Since January 1, 1993, the Union has been the limited exclusive collective-bargaining representative of the unit.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by (a) failing to honor, on and after January 1, 1993, its collective-bargaining agreement with the Union which expired by its terms on May 31, 1993; (b) failing to honor its collective-bargaining agreement with the Union effective June 1, 1993; (c) unilaterally changing wages and working conditions since January 1, 1993; (d) failing since about June 1, 1994, to furnish the Union with information which was requested by it on about June 1, 1994, and thereafter, and which is necessary for and relevant to the Union's performance of its duties as collective-bargaining representative of 15 the unit; and (e) dealing directly with employees in the unit.

6. The unfair labor practices set forth in Conclusion of Law 5 affect commerce with in the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the police of the Act.

Thus, Respondent will be ordered (1) to comply with the exclusive hiring hall provisions and the terms and conditions of employment in the current NECA-Union agreement and (2) to offer full and immediate employment to those individuals on the Union's out-of-work list who since January 1, 1993, were denied an opportunity to work for Respondent because of its failure to comply with the hiring hall provisions of Respondent's bargaining agreement with Local 26, as provided in *J. E. Brown Electric*, 315 NLRB 620 (1994); *Baker Electric*, supra at 335; and *S.M.S. Electrical*, 319 NLRB 642, 643–644 (1995). In addition, Respondent will be ordered, for the period beginning January 1, 1993, to make whole its employees and supervisors in the bargaining unit, as well as those individuals who were denied an opportunity to work, for any losses suffered as a result of its failure to abide by the applicable NECA-Union contract, as provided in *R. L. Reisinger Co.*, 312 NLRB 915 (1993); *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Baker Electric*, supra, 317 NLRB 335; *S.M.S. Electrical*, supra at 643–644; *F. J. Lieb Construction Co.*, 318 NLRB 914 (1985); and *F. W. Woolworth Co.*, 90 NLRB 289 (1950).[31] Further, Respondent will be required to make whole these employees, supervisors, and individuals by making all required fringe benefit contributions that have not been made since January 1, 1993, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979),[32] and by reimbursing the employees, supervisors, and individuals for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees and supervisors are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[33]

Although the General Counsel stated on the record that she might ask for attorneys' fees and expenses, her brief makes no such claim. However, the Union's posthearing brief contends (p. 40) that "in light of the Employer's tactics of raising frivolous defenses and submitting fraudulent document into evidence to support these defenses, the Union respectfully requests that the administrative law judge recommend extraordinary relief, including, but not limited to, the Respondent Employer's reimbursement of the Union's reasonable attorney's fees and other reasonable costs and ex-

[31] Although all of the collective-bargaining agreements involved here required the Union to refer applicants without discrimination based on membership or nonmembership in the Union, all of them also gave preference in referral to applicants who, along with other qualifications, had been employed for a specified minimum period of time, within a previous specified period, under a contract between the parties to the collective-bargaining agreement which includes this provision. Any issues thus presented are left to the compliance stage of this proceeding. See *Riley Electric*, 290 NLRB 374, 375 fn. 5 (1988). Cf. *Electrical Worker Local 322 v. NLRB*, 597 F.2d 1331 (10th Cir. 1979), and cases cited; *Electrical Workers Local 211 (Atlantic Div. NECA)*, 280 NLRB 85, 85–86, 107 (1986).

[32] To the extent that an employee, supervisor, or individual who is entitled to relief, as described above, has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's contribution for the period since January 1, 1993, the Respondent will reimburse the employee, supervisor, or individual, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. *Donovan & Associates*, 316 NLRB 169, 170 fn. 2 (1995).

[33] The bargaining agreements unlawfully dishonored by Respondent after January 1, 1993, contain clauses which require Respondent to honor checkoff authorizations. However, the complaint does not specifically allege that Respondent violated the Act by failing to honor checkoff authorizations. Moreover, there is no evidence that anyone in Respondent's employ after January 1, 1993, was a union member or applicant for membership or ever signed a checkoff authorization; or that any union member failed to pay his dues while working for Respondent. Nor does either the General Counsel or the Union request a remedial order which specifically addresses the checkoff clauses. Accordingly, as to the failure to honor the checkoff clauses, no reimbursement order will issue. See *Baker Electric*, supra at 335, where no such relief was afforded with respect to a respondent employer which unlawfully failed to honor the same agreement which has bound Respondent since June 1, 1993. Cf. *Williams Pipeline*, supra at 632, 637–638, 644–645.

The dishonored bargaining agreements also include a union-shop clause, with a 30-day grace period applicable to all new hires; but "This provision is not applicable where prohibited by law." Unlike the employees in Baker, where the employees apparently worked only in Virginia and were covered by Virginia's statutory prohibition of union-security agreements (§ 40.1-59-62, Code of Virginia), Respondent's employees also work in the District of Columbia and Maryland, which jurisdictions do not forbid union-security clauses. However, the complaint does not allege that Respondent violated the Act by failing to abide by the union-security clauses; nor does either the General Counsel or union counsel request a remedial order specifically directed to such conduct. Cf. *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976). Accordingly, as to the union-shop clauses, no make-whole order will issue.

penses." In so contending, the Union relies on *Tiidee Products, Inc.*, 194 NLRB 1234, 1236–1237 (1972), enfd. in part, affirmed in part, enf. denied in part 502 F.2d 349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1975). The Board may regard such relief as appropriate where the Respondent's defenses are "frivolous" rather than "debatable." Ordinarily, the Board regards as "debatable" a respondent's defenses which are dependent on resolutions of credibility, and as "frivolous" a respondent's defenses which are "clearly meritless on their face." *Fetzer Broadcasting Co.*, 227 NLRB 1377, 1389 (1977); relying on *Heck's, Inc.*, 191 NLRB 886 (1974).

In requesting litigation expenses, the Union specifically relies mostly upon Respondent's use of the alleged letter dated November 1, 1991, which, if genuine, may have constituted effective notice to the Union of an intent to terminate their bargaining relationship as of the expiration of the current bargaining agreement in June 1993. However, although I agree with the Union that this document is fraudulent, I conclude that this circumstance is insufficient to render Respondent's reliance therein as "frivolous" within the meaning of *Fetzer*. My finding that it was fraudulent is based on my action in discrediting Stewart's testimony that she sent it on the date it bears, a credibility finding based on a degree on my action in crediting the testimony of union officials and a union clerical employee that such a document was never received by the Union. While based largely on the physical characteristics of various alleged copies of the alleged letter, and the physical characteristics of other documents whose authenticity is undisputed, my conclusion that the alleged letter is fraudulent also rests to a significant extent on my finding that Stewart's allegedly authenticating testimony is inconsistent with her August 3, 1994, remarks to Satterfield and with her testimony about these documents and about when she used various fax numbers.

However, in *Frontier Hotel & Casino*, 318 NLRB 857, 860–862 (1995), the Board found the respondent corporation's defense to be "frivolous" where it rested

> on the transparently untruthful testimony of an attorney whose words and demeanor demonstrated unmistakably that he was not to be believed.
>
> Moreover, whereas the typical case involves the good-faith presentation of witnesses by counsel, the witness in this case was not only the Respondent's sole agent in bargaining, but was himself its counsel in preparing and presenting much of its case. Thus, [the attorney] was in the unusual position of being able to determine from personal knowledge that the Respondent's defense lacked credibility as well as merit.
>
> The policies advanced by Tiidee and its progeny cannot be protected if the Board deems "debatable" any and all defenses offered by a respondent—no matter how hollow or unbelievable. . . . To the extent that Heck's may be interpreted as precluding the reimbursement of litigation expenses even where only pro forma credibility resolutions are made, we modify that policy to make clear that the Board may find a respondent's defense frivolous and order reimbursement of litigation expenses where, as here, the defense relies on testimony that presents no legitimate issue of credibility.

In the instant case, of course, there is no reason whatever to suppose that Respondent's counsel knew that Stewart would be untruthful when she testified that about November 1, 1991, she sent the Union a letter bearing that date and purporting to terminate the bargaining agreement. On the other hand, Stewart herself obviously did know that she was not testifying truthfully; and, because she is Respondent's sole owner, a litigation-expenses order against Respondent would, if anything, be more closely connected with the wrongdoer than the award of litigation expenses against the respondent corporation in *Frontier Homes*, where the wrongdoer was the respondent's attorney rather than anyone who would lose by the award by reason of an ownership interest in the corporation which would have to pay it. Accordingly, *Frontier Homes* points to the conclusion that Respondent should be required to pay to the General Counsel and to the Union the litigation expenses attributable to Respondent's reliance on the alleged letter dated November 1, 1991. However, Board precedent does not appear to warrant the Union's contention that Respondent should be required to reimburse the Union for the 2-hour period during which union counsel (as well as the General Counsel and 1) vainly waited in the hearing room, on the last day of the hearing, for the arrival of a representative for Respondent. See *Kings Terrace Nursing Home*, 227 NLRB 251 (1976).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, SAS Electrical Services, Inc., Herndon, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to honor its collective-bargaining agreement with the International Brotherhood of Electrical Workers, Local Union No. 26, AFL–CIO, effective June 1, 1993.

(b) During the effective period of that agreement, unilaterally changing the wages, hours, and working conditions called for by that agreement.

(c) Failing to furnish Local 26 with information which is necessary for and relevant to Local 26's performance of its duties as collective-bargaining representative of the unit covered by that agreement.

(d) During the effective period of that agreement, dealing directly with employees in that unit.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with the exclusive hiring hall provisions and terms and conditions of employment in Respondent's current collective-bargaining agreement with Local 26.

(b) Offer full and immediate employment to those individuals on Local 26's out-of-work list who since January 1, 1993, were denied an opportunity to work for Respondent

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

because of its failure to comply with the hiring hall provisions of Respondent's bargaining agreements with Local 26, in the manner prescribed in the remedy section of this decision.

(c) For the period beginning January 1, 1993, make whole the employees and supervisors employed by it in the bargaining unit, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of its failure to honor the bargaining agreements; reimburse them for any expenses ensuing from Respondent's failure to make any contributions to the benefit funds; and make whole the benefit trust funds for losses suffered; all in the manner prescribed in the remedy section this decision.

(d) Pay to Local 26 and the General Counsel the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, to the extent that such costs and expenses were incurred in connection with Respondent's reliance on the alleged November 1, 1991, letter; such costs and expenses to be determined at the compliance stage of these proceedings.

(e) As to all jobs where Respondent has performed electrical work within the Union's territorial jurisdiction, or subcontracted electrical work, since June 1, 1991, forthwith provide Local 26 with the following information:

(1) The location and duration of all jobs where electrical work was or is being performed or has been subcontracted.

(2) The names and classifications of all employees performing electrical work.

(3) The wage rates and fringes being paid to such employees.

(4) As to any electrical work subcontracted during this period, a description of the work, the location and duration of the job, and the employer who was the subcontractor.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary or useful for analyzing the amounts due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its current job sites and its place of business in Herndon, Virginia, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed its Herndon operations, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1993.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to honor our collective-bargaining agreement with International Brotherhood of Electrical Workers, Local 26, AFL–CIO, effective June 1, 1993.

WE WILL NOT, during the effective period of that agreement, change the wages, hours, and conditions of employment called for by that agreement, unless the Union has agreed to such changes.

WE WILL NOT fail to furnish Local 26 with information which is necessary for and relevant to Local 26's performance of its duties as collective-bargaining representative of the unit covered by that agreement. This unit is: all employees performing electrical construction work within Local 26's jurisdiction.

WE WILL NOT, during the effective period of that agreement, deal directly with employees in that unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL comply with the exclusive hiring hall provisions and the terms and conditions of employment under our current collective-bargaining agreement with Local 26.

WE WILL offer full and immediate employment to those individuals on Local 26's out-of-work list who since January 1, 1993, were denied an opportunity to work for us because of our failure to comply with the hiring hall provisions of our bargaining agreements with Local 26.

WE WILL for the period beginning January 1, 1993, make whole with interest the employees and supervisors employed by us in the bargaining unit, as well as those individuals who were denied an opportunity to work, for losses suffered as a result of our failure to honor the bargaining agreements; reimburse such persons, with interest, for any expenses ensuing form our failure to make contributions to the benefit funds; and make whole the benefit trust fund for losses suffered; with interest

WE WILL pay to Local 26 and to the General Counsel of the National Labor Relations Board the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of the proceeding which resulted in the finding that we violated the Act, to the extent that such costs and expenses were incurred because of our reliance on a let-

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ter to Local 26 which we never in fact sent. Such costs and expenses include reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses.

WE WILL forthwith provide Local 26 with the information requested by Local 26 on and after June 1, 1994, which is necessary for and relevant to Local 26's performance of its duties as collective-bargaining representative of the unit covered by the agreement effective June 1, 1993.

SAS ELECTRIC SERVICES, INC.